RECORD AND BRIEFS

16-349

No. 16-___

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, regulates the conduct of "debt collector[s]." Respondent Santander Consumer USA, Inc., is in the business of purchasing defaulted debt for pennies on the dollar then attempting to collect on that debt from the defaulting consumer. The Question Presented, upon which the circuits are deeply divided, is:

Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a "debt collector" subject to the Fair Debt Collection Practices Act?

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Other Authorities

Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015) 17, 19, 27

CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf 28

Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 (March 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf 4

Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 (March 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf 19, 22, 28

Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change – A Workshop Report (February 2009), *available at* https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf 20, 27

Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf 27

Federal Trade Commission, The Structure and Practices of the Debt Buying Industry (January 2013) (on average, debt buyers pay four cents per dollar of debt face value), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf..... 20, 22

Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts, at 18 (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf..... 21

Release, CFPB, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts, *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts..... 21

Release, FTC, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle 21

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ricky Henson, Ian Matthew Glover, Karen Pacouloute, f/k/a Karen Welcome Kuteyi, and Paulette House respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is published at 817 F.3d 131. The opinion of the district court (Pet. App. 21a-40a) is unpublished but available at 2014 WL 1806915.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2016. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on April 19, 2016. Pet. App. 41a-42a. On July 5, 2016, the Chief Justice extended the time to file this petition through August 17, 2016. No. 16A12. On August 4, 2016, the Chief Justice further extended the time to file this petition through September 16, 2016. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1692a of Title 15 provides in relevant part:

> (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of

facilitating collection of such debt for another.

* * *

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is *the collection of any debts, or who regularly* collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a *third person* is *collecting* or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related

or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

STATEMENT OF THE CASE

In 1977, Congress enacted the Fair Debt Collection Practices Act in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The Act distinguishes between "debt collectors," who are subject to the statute, and "creditors," who generally are not. *See id.* § 1692a(4), (6). The reason for the distinction was that "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, p. 2 (1977).

As the Consumer Financial Protection Bureau has noted, the "advent and growth of debt buying is one of the most significant changes to the debt collection market" since Congress enacted the FDCPA in late 1970s.[1] Unlike traditional debt collectors, who were paid a portion of the debt collected on behalf of the debt originator, members of this new industry "purchase defaulted debt from original creditors" for pennies on the dollar and then "seek to collect on purchased debts themselves."[2]

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[1] Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 ("CFPB 2014 Annual Report"), at 7 (March 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf.

[2] *Id.*; *see also* Federal Trade Commission, The Structure and Practices of the Debt Buying Industry ("Debt Buying Industry"), at ii (January 2013) (on average, debt buyers pay

However, very much like other debt collectors, these purchasers of defaulted debt have powerful incentives to engage in aggressive collection practices and lack the countervailing incentives of ordinary creditors to maintain a good reputation with consumers.

The courts of appeals are deeply and avowedly divided over whether these purchasers of defaulted debt are covered by the FDCPA. This case presents the Court an opportunity to resolve that important conflict.

1. Petitioners obtained car loans from CitiFinancial Auto. When they were unable to make the payments and defaulted, CitiFinancial Auto repossessed their cars, sold the vehicles, and informed petitioners they owed a deficiency balance. Pet. App. 5a. It later sold the defaulted loans to respondent Santander Consumer USA, Inc. (Santander), which is in the business of purchasing defaulted debt for pennies on the dollar, then seeking to recover some or all of the debt from the defaulting debtor. *Id.*

On November 29, 2012, petitioners filed the present putative class action against respondents, alleging violations of the FDCPA. Among other things, petitioners alleged that Santander violated the statute by misrepresenting its authority to collect the debt and the amount of the debt allegedly owed, and by communicating directly with consumers it

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four cents per dollar of debt face value), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

knew to be represented by counsel. *See* Pet. App. 5a, 23a; Complaint ¶ 10.[3]

Santander moved to dismiss, arguing that it did not qualify as a "debt collector" under the statutory definition because it had purchased the defaulted debt it was seeking to collect. Pet. App. 6a. The FDCPA provides that a defendant is a "debt collector" if it meets either of two definitions, subject to a number of exceptions. The term "debt collector," thus, is defined as:

> any person **[1]** who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or **[2]** who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include— . . .
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a *debt which was not in default at the time it was obtained by such person* . . . .

15 U.S.C. § 1692a(6) (emphasis added).

The statute distinguishes debt collectors, so defined, from "creditors." Similar to the definition of "debt collector," the definition of "creditor" includes

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[3] The Complaint is included at pages 5-21 of the Joint Appendix filed with the Fourth Circuit.

an exception that depends on the default status of transferred debt:

> The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he *receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another*.

Id. § 1692a(4) (emphasis added).

Like many purchasers of defaulted debt, Santander, a consumer finance company, conducts a range of other business activities, precluding it from coverage under the first prong of the "debt collector" definition covering businesses whose "principal purpose . . . is the collection of any debts." 15 U.S.C. § 1692a(6). *See* Pet. App. 13a. Accordingly, the question was whether Santander met the second "regularly collects" prong of the definition or was, instead, a creditor.

Pointing to Section 1692a(6)(F)(iii), petitioners argued that "non-originating debt buyers (i.e. Santander) are subject to liability under the FDCPA where the debt acquired was in default." Pet. App. 29a. In contrast, Santander "argue[d] that it is a creditor exempt from liability under the FDCPA because it held the debt and collected the same on its own behalf." *Id.*

The district court agreed with Santander and dismissed. Petitioners appealed. Pet. App. 6a.

2. The Fourth Circuit affirmed, explaining that "[w]hile the FDCPA is a somewhat complex and technical regulation of debt collector practices, we

conclude that it generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it purchased the loans before engaging in the challenged practices." Pet. App. 4a-5a. In the course of doing so, the court expressly embraced the position of the Ninth and Eleventh Circuits, *id.* 18a, while recognizing that it was departing from the rule applied in the Third, Sixth, and Seventh Circuits, *id.* 12a.

The Fourth Circuit accepted that Santander satisfied the portion of the definition of "debt collector" encompassing a company that "regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. § 1692a(6). But it concluded that purchasers of defaulted debt are saved from regulation by the additional requirement that the debt be "owed or due *another*." *Id.* (emphasis added). The court assumed that Congress meant "owed or due another *at the time of collection*" rather than "owed or due another *at the time of origination*." *See* Pet. App. 17a-18a; *contra FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007) ("Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA."). On that understanding of the statute, the court concluded that Santander was not a debt collector because "the debts that Santander was collecting were owed to it, Santander, not to another." Pet. App. 13a.

The court did not dispute that this interpretation rendered one of the exceptions to the definition of "debt collector" surplusage. Specifically, Section

1692a(6)(F)(iii), provides that the term "debt collector" does "not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." On the Fourth Circuit's view, that exemption would never come into play because someone who "obtained" a defaulted debt would not be attempting to collect a debt "owed or due another" but would rather be collecting a debt owed to itself. But the court sidestepped the problem by declaring that if "a person does not satisfy one of the definitions in the main text, the exclusions in subsections § 1692a(6)(A)-(F) do not come into play." *Id.* 11a; *see also id.* 14a-15a.

The court of appeals also made no effort to square its interpretation with the basic purposes of the statute, which is to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). It did not contest, for example, that Congress distinguished between creditors and debt collectors because it believed that creditors would be "restrained by the desire to protect their good will when collecting past due accounts," while debt collectors would be "likely to have no future contract with the consumer" and therefore "unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2. Nor did it doubt that the "purchaser of an already-defaulted debt – like a debt collector, and unlike the originator and servicer of a non-defaulted debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect." *Ruth v. Triumph P'ships*, 577 F.3d 790, 797 (7th Cir. 2009).

3. Petitioner filed a petition for rehearing en banc, noting that the panel decision exacerbated a circuit conflict, but the petition was denied. Pet. App. 41a-42a.

REASONS FOR GRANTING THE WRIT

As the Fourth Circuit documented, the question whether the FDCPA applies to those who purchase defaulted debt is the subject of a deep, mature circuit conflict that has only become more entrenched with time. The question is of vital importance to both consumers and a burgeoning industry of defaulted debt purchasers whose legal responsibilities presently vary dramatically from circuit to circuit. And the Fourth Circuit's resolution of the statutory question is wrong, at odds with the text and purposes of the statute, while also in conflict with the reasonable interpretation of the federal agencies delegated responsibility for its enforcement. This case thus presents the Court an opportunity to resolve an intolerable circuit conflict and restore important protections to consumers throughout the country.

I. There Is A 5-3 Conflict Over Whether Collectors Of Purchased Defaulted Debt Are "Debt Collectors" Under The FDCPA.

As the Fourth Circuit's opinion documents, the circuits are deeply divided over the FDCPA's application to companies that purchase and collect defaulted debt. Four circuits and the District of Columbia Court of Appeals hold that such companies are debt collectors under the Act, while three other circuits have rejected that interpretation.

A. The Third, Fifth, Sixth, And Seventh Circuits, And The District of Columbia Court of Appeals, Hold That Collectors Of Purchased Defaulted Debt Are Debt Collectors Within The Meaning Of The FDCPA.

The decision below directly conflicts with longstanding precedent from the Third, Fifth, Sixth, and Seventh Circuits and the District of Columbia Court of Appeals.

1. ***Third Circuit.*** In *Federal Trade Commission v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007), the defendant was in the business of purchasing debts arising from bounced consumer checks. *Id.* at 162. The founder of Check Investors had previously served time in prison for posing as an FBI agent in attempts to collect debts. *Id.* at 163. He started his new business on the assumption "that if a debt collection business collected only debts it actually owned based on purchasing [bounced] checks, it would not be subject to the FDCPA, and would therefore be free to use collection techniques prohibited by the FDCPA such as harassment and deception." *Id.*

Acting on that belief, the business's "primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution." *Id.* For example, one "consumer was told that if she did not pay, her children would 'watch their mother being taken away in handcuffs,' and they would 'be bringing their mommy care packages in prison.'" *Id.* These threats "were all false," but effective. *Id.* "In one case, Check Investors' repeatedly called a 64-year

old mother regarding her son's debt; fearing that her son would be arrested and carted off to jail, she paid the amount of the demand." *Id.* at 164. The demanded amount typically included "a fee of $125 or $130 [added] to the face amount of each check; an amount that exceeded the legal limit for such fees under the laws of most states." *Id.* at 163.

The Federal Trade Commission successfully brought suit, alleging violations of various provisions of the FCPA. On appeal, Check Investors argued, as respondent did below, that it was not a debt collector, but rather a creditor, because it was "collecting debts actually owed to them, as opposed to . . . collecting obligations owed to someone else." *Id* at 172. Relying in part on its prior decision in *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the Third Circuit affirmed.

The court began by noting that the statute was not entirely clear on this question. Ordinarily, the Act distinguishes between "debt collectors" who are covered by the statute and "creditors" who usually are not. *Check Investors*, 502 F.3d at 173. However, "for debts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category." *Id.* (quoting *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003)). Because one cannot be both a creditor and a debt collector for any given transaction, a line had to be drawn. To draw it, the court looked to statute's exception of those who collect debt "which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The court reasoned that there

would be no point in specifically excluding collectors of *un*defaulted debt from the definition of "debt collector" unless Congress contemplated that collecters of *defaulted* debt counted as debt collectors subject to the statute. 502 F.3d at 173.

The court acknowledged that at the time of collection, a company like Check Investors might be owed the debt and, therefore, could be seen as "at least nominally a creditor." *Id.* "Nevertheless, pursuant to § 1692a, Congress has unambiguously directed our focus to *the time the debt was acquired* in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* (emphasis added).

The Third Circuit noted that this interpretation also best accorded with the statute's purpose and rationale. *Id.* at 173 (citing S. Rep. No. 95-382, at 2). The court observed that the purchaser of defaulted debt acted in the same manner, and with the same dangerous incentives, as a typical third-party debt collector rather than an ordinary creditor: "No merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors." *Id.*

2. ***Sixth Circuit***. In *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012), the Sixth Circuit adopted the Third Circuit's interpretation, "hold[ing] that the definition of debt collector pursuant to § 1692a(6)(F)(iii) includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition." *Id.* at 362.

The court agreed with the Third Circuit that "as to a specific debt, one cannot be both a 'creditor' and a 'debt collector,' as defined in the FDCPA, because those terms are mutually exclusive." *Id.* at 359 (quoting *Check Investors*, 502 F.3d at 173). And it agreed that the "distinction between a creditor and a debt collector lies precisely in the language of § 1692a(6)(F)(iii)." *Id.* On that understanding, for "an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired." *Id.*

3. ***Seventh Circuit.*** The Seventh Circuit applied the same rule in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009). As in this case, the defendant in *Ruth* was "a company that purchases defaulted debts and attempts to recover them." *Id.* at 793. And as in this case, the defendant argued that because it was collecting defaulted debt it had purchased, "the FDCPA does not apply to it." *Id.* at 796.

The Seventh Circuit rejected that claim. "Where, as here, the party seeking to collect a debt did not originate it but instead acquired it from another party, we have held that the party's status under the FDCPA turns on whether the debt was in default at the time it was acquired." *Id.* (citing *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 538-39 (7th Cir. 2003)).

The court explained that this view of the text finds additional support "in the rationale behind Congress' decision to treat the originator of a debt

obligation differently from a party whose only interest is in the collection of a debt that already has fallen into default." *Id.* at 797. "The purchaser of an already-defaulted debt – like the debt collector, and unlike the originator and servicer of a non-defaulted debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect." *Id.*

4. ***Fifth Circuit and District of Columbia Court of Appeals.*** The Fifth Circuit and the District of Columbia Court of Appeals have also construed the FDCPA to apply to "those entities whose interest in the debt was acquired when the debt was in default." *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1021 (D.C. 2013) (citing *Ruth*, 577 F.3d at 796-97; *Check Investors*, 502 F.3d at 172-73); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A] debt collector does not include . . . an assignee of a debt, *as long as the debt was not in default at the time it was assigned.*" (emphasis added)).

B. The Fourth, Ninth, And Eleventh Circuits Reject The Majority Rule.

The Fourth, Ninth, and Eleventh Circuits have reached the opposite conclusion.

1. ***Fourth Circuit.*** As discussed above, the Fourth Circuit in this case acknowledged the decisions of the Third, Sixth, and Seventh Circuits, but rejected their reasoning, concluding instead that "the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in 15 U.S.C. § 1692a(6)." Pet. App. 8a. "That determination," the court believed, ordinarily turns instead "on whether a

person collects debt *on behalf of others* or *for its own account*." *Id.* (emphasis in original). Because "the debts that Santander was collecting were owed to it, Santander, not to another," respondent was excluded from the Act's coverage. *Id.* 13a-14a.

2. ***Ninth Circuit.*** The Ninth Circuit had previously reached the same conclusion based on similar reasoning in *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013). In that case, Wells Fargo acquired a defaulted mortgage as part of a bankruptcy proceeding. *Id.* at 1206. Without acknowledging or engaging with the contrary views of other circuits, the Ninth Circuit held that because Wells Fargo had acquired the debt, it could not be a debt collector because it was not attempting to collect a debt owed to "another" within the meaning of the statutory definition of a "debt collector." *Id.* at 1209.

3. ***Eleventh Circuit.*** In *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), the Eleventh Circuit likewise was required to decide "whether a bank that collects or attempts to collect on a debt, which was in default at the time it was acquired by the bank, qualifies as a 'debt collector' under the" FDCPA. *Id.* at 1310. Like the Fourth Circuit below, the Eleventh Circuit rejected the claim that "the line between creditors and debt collectors is drawn by the default status of the debt." *Id.* at 1314. Instead, the court concluded that it needed to

> look no further than the statutory text to conclude that, under the plain language of the FDCPA, a bank (or any person or entity) does not qualify as a "debt collector" where the bank does not regularly collect or

> attempt to collect on debts "owed or due another" . . . even where the consumer's debt was in default at the time the bank acquired it.

Id. at 1311; *see also id.* at 1316 ("[W]e reject Davidson's argument that a non-originating debt holder is a 'debt collector' for purposes of the FDCPA solely because the debt was in default at the time it was acquired.").[4]

The Federal Trade Commission filed an amicus brief supporting rehearing en banc in *Davidson*, arguing that the question decided by the panel "is exceptionally important, and the panel incorrectly decided it in conflict with the decisions of four other courts of appeals." Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc, *Davidson*, *supra*, at 5 (hereinafter "FTC *Davidson* Br.").[5] However, the Eleventh Circuit denied the petition.

C. Only This Court Can Resolve The Circuit Conflict.

There is no genuine prospect that the circuit split will resolve itself without this Court's intervention.

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[4] The Eleventh Circuit held open that purchasers of defaulted debt could fall under the first prong of the statutory definition of a "debt collector," if its "principal purpose" is the collection of debts. *Id.* at 1316 n.8. But it did not dispute that even if this were so, it would exclude a great many companies (like the defendant before it and respondent here) that regularly collect defaulted debt as a significant – but not "principal" – portion of their business.

[5] *Available at* 2015 WL 5608572.

The Fourth Circuit issued its decision fully aware of the contrary authority in other circuits, *see* Pet. App. 12a, and denied a rehearing petition premised on the circuit conflict. The Eleventh Circuit likewise persisted in its position despite the Federal Trade Commission's amicus brief in support of rehearing, which pointed out the circuit conflict and the importance of the question. At the same time, the Government's support for the majority position makes it unlikely all five of the courts on the other side of the divide will go en banc and reverse course.

Finally, because courts on both sides of the conflict believe their conclusions are compelled by the statute, there is no prospect that a federal agency could resolve the dispute by issuing regulations. *Compare Check Investors*, 502 F.3d at 173 ("Congress has *unambiguously* directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." (emphasis added)), *with Davidson*, 797 F.3d at 1316 ("The statute is *not susceptible* to [that] interpretation. Instead, applying the *plain language* of the statute, we find that a person who does not otherwise meet the requirements of § 1692a(6) is not a 'debt collector' under the FDCPA, even where the consumer's debt was in default at the time the person acquired it." (emphasis added)).

II. The FDCPA's Application To Purchasers Of Defaulted Debt Is A Question Of Substantial Importance.

The Federal Trade Commission had ample grounds for telling the Eleventh Circuit that the question presented in that case (and now by this petition) is exceptionally important. *See* FTC

Davidson Br. 5. The Fourth Circuit's decision "will remove important protections for consumers in the states of [that] Circuit and may hamper both government and private efforts to combat abusive debt-collection practices." *Id.* 1-2. At the same time, the current circuit split disserves the growing debt buying industry, which finds itself subject to dramatically different federal requirements across a hodge-podge of states.

1. Congress enacted the FDPCA because it recognized the importance of protecting consumers from the documents abuses of the debt collection industry. 15 U.S.C. § 1692(a). Those practices, Congress determined, impose significant harm on their victims, contributing to "the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.*

In the decades since the FDCPA was passed, Government enforcement efforts have documented that the abuses that gave rise to the statute continue to afflict many consumers. In 2016 alone, the debt collection industry was the subject of more than 85,000 complaints to federal consumer protection agencies, more than any other industry.[6] At the same time, federal enforcement actions resulted in

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[6] *See* Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 ("CFPB 2016 Annual Report"), at 18 (March 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

over $360 million in relief to consumers and $79 million in civil penalties.[7]

Whether the FDCPA provides a remedy for such abuses when perpetrated by debt buyers is a question of critical importance to consumers and government enforcement agencies. The FTC has called the advent and growth of debt buying "the most significant change in the debt collection business in the past decade." Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change – A Workshop Report ("The Challenges of Change"), at iv (February 2009).[8] Debt buying was rare at the time the FDCPA was enacted. *See* Debt Buying Industry, *supra*, at 12 ("The practice of creditors selling consumer debts on a large scale has its origins in the savings and loan crisis of the late 1980s and early 1990s."). It now constitutes a multi-billion dollar industry with "hundreds, if not thousands, of entities of varying sizes that purchase debts." *Id.* at 14.

As the cases in the circuit split demonstrate, the risk of abusive collection practices is not eliminated when a debt collector purchases the defaulted debt it is seeking to collect. Indeed, the Federal Government has asserted FDCPA claims against numerous debt buyers, alleging serious misconduct. For example, in 2004, the Government settled claims against one debt buyer it alleged had "threatened and harassed

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[7] *Id.* at 27.

[8] *Available at* https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

thousands of consumers to get them to pay old, unenforceable debts or debts they did not owe," "[u]sing obscene or profane language," "[c]alling consumers continuously with the intention of annoying and abusing them," "misrepresenting themselves as attorneys," and "[t]hreatening imprisonment, seizure, garnishment, attachment or sale of property or wages with full knowledge that such action could not legally be taken."[9] Even after the settlement, the debt buyer continued to engage in illegal misconduct, requiring further enforcement action.[10]

More recently, the Government filed FDCPA claims against the country's two largest debt buyers, alleging, among other things, that "[w]ithout verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents," including lawsuits that they knew or should have known were barred by the statute of limitations.[11] Similar abuses have been documented elsewhere.[12]

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[9] *See* Release, FTC, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle.

[10] *See* Release, FTC, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices.

[11] *See* Release, CFPB, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad

The Government has also found that the debt buying process may itself contribute to violations of consumer's rights as important information (*e.g.*, regarding the amount and validity of a debt) may be lost as a debt is sold from one entity to another.[13]

2. Resolution of the question presented is also important for debt buyers. In those circuits exempting debt buyers from FDCPA coverage, companies that engage in ethical collection practices are put at precisely the competitive disadvantage Congress intended the FDCPA to eliminate. *See* 15 U.S.C. § 1692(e).

At the same time, the many debt buyers operating in multiple circuits are subject to varying legal requirements. Increasingly, the debt buying market has come to be dominated by large national firms operating in many states. Debt Buying Industry, *supra*, at 7 (finding that nine of the largest debt buyers "collectively purchased 76.1% of all consumer debt sold in 2008"). Presently, the same buyer may be subject to radically different obligations

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Debts, *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts.

[12] *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014); Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts, at 18 (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf.

[13] *See* CFPB 2016 Annual Report, *supra*, at 10-11.

depending on whether a debtor is living in Atlanta or Knoxville, Philadelphia or Richmond.

The existing circuit conflict also creates an incentive for forum shopping. While consumers presumably prefer to litigate FDCPA cases in their home districts, they always have the right to sue a corporate defendant in its state of incorporation or principal place of business, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), which may be in a circuit with different law on the question presented.

III. The Fourth Circuit's Decision Is Wrong.

Certiorari is further warranted because the decision below is wrong.

A. The Decision Below Conflicts With The Text, Structure, And Purposes Of The FDCPA.

1. The Fourth Circuit believed that the text of the statute unambiguously excludes purchasers of defaulted debt from FDCPA responsibilities by defining "debt collectors" to include only those who attempt to collect debts "owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added); *see, e.g.*, Pet. App. 8a, 10a, 11a. Because debt buyers attempt to collect debts owed to themselves, it reasoned, they are not attempting to collect a debt due "another." Pet. App. 10a.

The unspoken premise of this reasoning is that a debt originated by a creditor becomes "due another" within the meaning of the statute upon assignment to a third party debt buyer. But that is far from obvious. To be sure, the assignee becomes entitled to demand that the payment owed the originator be tendered to the assignee. *See* RESTATEMENT

(SECOND) OF CONTRACTS § 317(1). But in common parlance, it is easy enough to say that the debt is owed to the originator, with the assignee simply entitled to collect it. *See id.* chp. 15 introductory note (explaining that assignments were originally conceived as a form of "power of attorney enabling the assignee to sue in the assignor's name"). Or put another way, the statute's reference to a debt "due another" simply does not say whether the debt must be "due another *at the time of collection*" or "due another *at the time of origination.*"

If there was nothing in the statute beyond the reference to a debt "due another," the Fourth Circuit's resolution of that ambiguity might be plausible. But there *is* more to the statute, and that additional language cuts decisively against the court of appeal's interpretation. In the very same definitional paragraph Congress stated that the term "debt collector" does *not* include "any person collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . concerns a debt which was *not in default at the time it was obtained* by such person." 15 U.S.C. § 1692a(6)(F)(iii) (emphasis added).

The subsection (F)(iii) exception demonstrates that Congress did *not* intend that the main definition's reference to debt "due another" automatically exclude any defendant collecting an assigned debt – if that were so, the exception in subsection (F)(iii) would be superfluous. That is, all of the entities described in subsection (F)(iii) have "obtained" the debt they are attempting to collect. As a result, on the Fourth Circuit's interpretation, none is attempting to collect a debt that is "due another"

within the meaning of the main definition. And if that is right, an entity attempting to collect a debt that "was not in default at the time it was obtained" has no need of the subsection (F)(iii) exception – it was never in danger of being considered a debt collector in the first place.

At the same time, the Fourth Circuit's interpretation does violence to subsection (F)(iii)'s necessary implication that assignees of defaulted debt are otherwise included as "debt collectors" under the provision's main definition.

Both problems are avoided by the interpretation adopted by the majority of circuits, which understand the main definitions' reference to a debt "due another" to refer to debts due another at the time of origination, not the time of collection. So understood, the main definition captures debt buyers and other assignees, but the subsection (F)(iii) exception then eliminates assignees who obtain the debt before it falls into default, as is typical of debt servicing companies, whom Congress intended to leave unregulated by the Act. *See* S. Rep. No. 95-382, at 3-4.

2. This harmonization of the various parts of the "debt collector" definition best aligns with the statute's overall structure and basic rationale.

For one thing, the definition of a "creditor" contains an exception roughly parallel to the subsection (F)(iii) exception to the definition of a "debt collector." *See* 15 U.S.C. § 1692a(4). That creditor exception again turns on whether the collector acquired the debt before or after it went into default. *See id.* As construed by the majority of courts, these definitions and their exceptions work in

tandem – one who collects a debt obtained before it went into default is a creditor, not a debt collector; one who obtains the debt after default is a debt collector, not a creditor.

Drawing this distinction is also "reasonable in light of the conduct regulated by the statute." *Schlosser*, 323 F.3d at 538. "If the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." *Id.* at 536. A purchaser of defaulted debt has the same incentives for aggressive collection as any other third party debt collector, while similarly lacking the countervailing market pressures to maintain the goodwill of debtors. There is no reason for Congress to treat them differently and nothing in the text of the statute that requires courts to overlook this important reality.

B. The Decision Below Conflicts With The Considered View Of The Agencies Congress Tasked With Enforcing The FDCPA.

Finally, the decision below warrants review because it conflicts with the longstanding interpretation of the agencies Congress assigned principal responsibility for enforcing the FDCPA.

As originally enacted, the FDCPA authorized the Federal Trade Commission to "enforce compliance with" the Act, using its powers under the Federal Trade Commission Act. *See* 15 U.S.C. § 1692*l*(a). As part of the Consumer Financial Protection Act of 2010, the Consumer Financial Protection Bureau was also given overlapping enforcement authority with

respect to non-bank financial institutions. *See id.* § 1692*l*(b)(6).

These two agencies and the Solicitor General have consistently construed the FDCPA to apply to purchasers of defaulted debt. For example, defending the Federal Trade Commission's victory in *Check Investors* in 2008, the Solicitor General took the position in this Court that the "statutory distinction between a 'creditor' and a 'debt collector' depends, in the case of a third party to whom a debt has been transferred or assigned, solely upon whether the debt in question was in default at the time of the transfer or assignment." U.S. BIO 12, *Check Investors, Inc. v. FTC*, No. 08-37. [14] And as noted above, the Commission filed an amicus brief urging rehearing of the Eleventh Circuit's contrary decision in *Davidson*, stating that a "company that regularly buys debts owed to others and collects them is a 'debt collector' under the FDCPA for debts that were in default at the time it acquired those debts, even though, in acquiring them outright, the company was collecting them on its own behalf rather than 'for' another entity with a continuing ownership interest in them." FTC *Davidson* Br. 9. The Commission has also expressed its interpretation in other official documents and publications.[15] More recently, the

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[14] *Available at* 2008 WL 4533650. The petition in *Check Investors* was filed prior to the emergence of the circuit conflict. *See id.* at 12.

[15] *See, e.g.*, The Challenges of Change, *supra*, at 5; Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, at 6

Consumer Finance Protection Bureau has embraced the same interpretation in publications, enforcement actions, and reports to Congress. [16]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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n.15 (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

[16] *See, e.g.*, CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf; CFPB 2016 Annual Report, *supra*, at 33-34 (discussing enforcement actions in report to Congress).

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1187

RICKY HENSON; IAN MATTHEW GLOVER; KAREN PACOULOUTE, f/k/a Karen Welcome Kuteyi; PAULETTE HOUSE,
Plaintiffs - Appellants,

v.

SANTANDER CONSUMER USA, INC.,
Defendant - Appellee,

and

COMMERCIAL RECOVERY SYSTEMS, INC.; NCB MANAGEMENT SERVICES, INCORPORATED,
Defendants.

AARP; NATIONAL CONSUMER LAW CENTER; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; CIVIL JUSTICE, INC.; PUBLIC JUSTICE CENTER, INC.; MARYLAND

CONSUMER RIGHTS COALITION, INC.; ATTORNEY GENERAL OF MARYLAND,

Amici Supporting Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:12-cv-03519-RDB)

Argued: December 9, 2015 Decided: March 23, 2016

Before NIEMEYER, DUNCAN, and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Duncan and Judge Agee joined.

ARGUED: Cory Lev Zajdel, Z LAW, LLC, Reisterstown, Maryland, for Appellants. Kim M. Watterson, REED SMITH LLP, Pittsburgh, Pennsylvania, for Appellee. **ON BRIEF:** Travis Sabalewski, Robert Luck Jr., Richmond, Virginia, Richard L. Heppner, REED SMITH LLP, Pittsburgh, Pennsylvania, for Appellee. Julie Nepveu, AARP FOUNDATION LITIGATION, Washington, D.C., for Amicus AARP. Joseph S. Mack, Catherine Gonzalez, CIVIL JUSTICE, INC., Baltimore, Maryland; Brian

E. Frosh, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Amici Attorney General of Maryland, Civil Justice, Inc., Maryland Consumer Rights Coalition, Inc., National Association of Consumer Advocates, National Consumer Law Center and Public Justice Center, Inc.

NIEMEYER, Circuit Judge:

Four Maryland consumers commenced this action against Santander Consumer USA, Inc., and its agents, alleging that the defendants violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p, by engaging in prohibited collection practices when collecting on the plaintiffs' automobile loans. The loans were originally made by CitiFinancial Auto, and, after the plaintiffs were unable to make payments, CitiFinancial Auto foreclosed on the loans, leaving the plaintiffs obligated to pay deficiencies. CitiFinancial Auto then sold the defaulted loans to Santander as part of an investment bundle of receivables, and Santander thereafter attempted to collect on the loans it had purchased.

The district court granted Santander's motion to dismiss the claims against it under Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaint did not allege facts showing that Santander qualified as a "debt collector" subject to the FDCPA. The court concluded that the complaint demonstrated that Santander was a consumer finance company that was collecting debts *on its own behalf* as a creditor and that the FDCPA generally does not regulate creditors collecting on debt owed to themselves.

We affirm. While the FDCPA is a somewhat complex and technical regulation of debt collector practices, we conclude that it generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it

purchased the loans before engaging in the challenged practices.

I

Ricky Henson, Ian Glover, Karen Pacouloute, and Paulette House, Maryland consumers who are the plaintiffs in this action, each signed a retail installment sales contract with CitiFinancial Auto Credit, Inc., CitiFinancial Auto Corp., or CitiFinancial Auto, LTD (collectively, "CitiFinancial Auto") to finance the purchase of an automobile. When the plaintiffs were unable to make the payments required by the contracts and thereby defaulted, CitiFinancial Auto repossessed and sold their vehicles and subsequently informed each plaintiff that he or she owed a deficiency balance.

On December 1, 2011, CitiFinancial Auto sold $3.55 billion in loan receivables, including the plaintiffs' defaulted loans, to Santander, a consumer finance company. The plaintiffs allege that, as part of its business, Santander "acquires defaulted consumer debt . . . for a few cents on the dollar."

Thereafter, Santander and its agents, presumably in an effort to collect more than the few cents on the dollar that it paid for defaulted loans, "began communicating with [the plaintiffs] . . . in an attempt to collect on the alleged debts." And during the course of those communications, Santander and its agents allegedly misrepresented the amount of the debt and their entitlement to collect it.

The plaintiffs commenced this action in November 2012 against Santander and its agents, alleging that they violated the FDCPA in pursuing the debts and in the manner they pursued them. In

their complaint, they proposed to represent a class of certain debtors "who were subjected to debt collection efforts by Santander Consumer USA, Inc. on or after December 1, 2011," the date on which Santander purchased the receivables from CitiFinancial Auto.

Santander filed a motion to dismiss the complaint against it under Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaint's allegations did not demonstrate that Santander qualified as a "debt collector," as necessary to trigger liability under the FDCPA, and the district court granted the motion by order dated May 6, 2014. In its supporting opinion, the court noted that the FDCPA applies to "debt collectors," as that term is defined in the Act, but not to "creditors collecting debts in their own names and whose primary business is not debt collection." In reaching its conclusion, the court rejected the plaintiffs' argument that, because the plaintiffs' loans were in default when Santander acquired them from CitiFinancial Auto, Santander qualified as a debt collector under the FDCPA, rather than as a creditor.

The plaintiffs filed this appeal, presenting the single issue of whether, as necessary to state an FDCPA claim, their complaint adequately alleged that Santander was acting as a "debt collector," as that term is defined in 15 U.S.C. § 1692a(6), when it engaged in the collection practices challenged in the suit.

II

In their brief on appeal, the plaintiffs state their position that Santander was a "debt collector,"

subject to regulation by the FDCPA, based on the following reasoning:

> The terms "debt collector" and "creditor" are mutually exclusive under the FDCPA. An entity can be either a "debt collector" or a "creditor" in any particular transaction. The determining factor of whether an entity is a "debt collector" or "creditor" in any particular transaction when the entity in question is not the originating lender is *whether the debt was acquired prior to default or after default*. Since Santander acquired [the plaintiffs'] debts from the original lender well after each [plaintiff] defaulted on their debt, Santander's collection activities on these defaulted debts make[] it a "debt collector."

(Emphasis added). To make their argument, the plaintiffs rely on their interpretations of 15 U.S.C. §§ 1692a(4) and 1692a(6), which define "creditor" and "debt collector," respectively. Their argument rests on the premise that the FDCPA regulates debt collectors, not creditors, and that the two terms, as used in the Act, are mutually exclusive. *See Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 359 (6th Cir. 2012); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007). Thus, they reason, because § 1692a(4) excludes from the definition of *creditor* "any person to the extent that he receives an assignment or transfer of *a debt in default* solely for the purpose of facilitating collection of such debt for another," such person must of logical necessity be a *debt collector*. Because Santander fits, as they argue, the exclusion from the definition of "creditor," it must therefore be

a "debt collector." They claim that this conclusion is fortified by one of the exclusions to the definition of "debt collector." *See* 15 U.S.C. § 1692a(6)(F)(iii) (excluding from the definition of debt collector "any person collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . concerns a debt which was not *in default* at the time it was obtained" (emphasis added). At bottom, they maintain that *the default status of debt* determines whether a purchaser of debt, such as Santander, is a debt collector or a creditor.

The plaintiffs' argument, however, contains several interpretational and logical flaws, such that their interpretation of the FDCPA ultimately stands in tension with its plain language. When arguing from the definition of *creditor*, they overlook the fact that the exclusion applies only to a person who receives defaulted debt "solely for the purpose of facilitating collection . . . *for another*." 15 U.S.C. § 1692a(4) (emphasis added). Similarly, in relying on the exclusion in § 1692a(6)(F)(iii), they fail to address whether Santander fits under any definition of "debt collector" before addressing whether the (F)(iii) exclusion applies.

We conclude that the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in 15 U.S.C. § 1692a(6). That determination is ordinarily based on whether a person collects debt *on behalf of others* or *for its own account*, the main exception being when the "principal purpose" of the person's business is to collect debt.

We begin our explanation by noting at a general level that the FDCPA purports to regulate only the conduct of debt collectors, not creditors, generally distinguishing between the two based on whether the person acts in an agency relationship with the person to whom the borrower is indebted. With limited exceptions, a debt collector thus collects debt on behalf of a creditor. A creditor, on the other hand, is a person to whom the debt is owed, and when a creditor collects its debt for its own account, it is not generally acting as a debt collector.

The FDCPA's definitions of debt collector and creditor bear out this distinction.

The definition of debt collector, which is contained in § 1692a(6), is comprised of two parts. The first part defines the classes of persons that are *included* within the term "debt collector," while the second part defines those classes of persons that are *excluded* from the definition of debt collector. The first part, defining those who are included, provides in relevant part:

> The term "debt collector" means any person [1] who uses any instrumentality of interstate commerce or the mails in any business *the principal purpose of which is the collection of any debts*, or [2] who *regularly collects* or attempts to collect, directly or indirectly, *debts owed or due or asserted to be owed or due another*. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor [3] who, in the process of collecting his own debts, *uses any name other than his*

> *own* which would indicate that a third person is collecting or attempting to collect such debts.

15 U.S.C. § 1692a(6) (emphasis added). Stated more simply, this provision defines a debt collector as (1) a person whose *principal purpose* is to collect debts; (2) a person who *regularly* collects debts *owed to another*; or (3) a person who collects *its own debts*, using *a name other than its own* as if it were a debt collector.

The second part of § 1692a(6) defines the classes of persons that are excluded from the definition of debt collector, so that a person who meets one of the definitions of debt collector contained in the first part of § 1692a(6) will not qualify as such if it falls within one of the exclusions. As relevant here, exclusion (F)(iii) provides that "[t]he term [debt collector] does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). To simplify, this exclusion means that a person collecting nondefaulted debts on behalf of others is not a debt collector. This exclusion was intended by Congress to protect those entities that function as loan servicers for debt not in default. *See* S. Rep. No. 95-382, at 3-4 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 ("[T]he committee does not intend the definition [of debt collector] to cover the activities of . . . *mortgage service companies and others who service outstanding debts for others*, so long as the debts were not in default when taken for servicing" (emphasis added)).

Thus, the overall structure of § 1692a(6) makes clear that when assessing whether a person qualifies as a "debt collector," we must first determine whether the person satisfies one of the statutory definitions given in the main text of § 1692a(6) before considering whether that person falls into one of the exclusions contained in subsections § 1692a(6)(A)-(F). If a person does not satisfy one of the definitions in the main text, the exclusions in subsections § 1692a(6)(A)-(F) do not come into play. *See Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1314 (11th Cir. 2015) ("[W]here a person does not fall within subsection (F) or any one of the six statutory exclusions, he is not deemed a 'debt collector' as a matter of course. [Instead], . . . he must satisfy the Act's substantive requirements").

The material distinction between a debt collector and a creditor -- at least with respect to the second definition of "debt collector" provided by § 1692a(6) -- is therefore whether a person's regular collection activity is only *for itself* (a creditor) or whether it regularly collects *for others* (a debt collector) -- not, as the plaintiffs urge, whether the debt was in default when the person acquired it. *See Heintz v. Jenkins*, 514 U.S. 291, 293 (1995) ("The Act's definition of the term 'debt collector' includes a person 'who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another'" (alteration in original) (quoting § 1692a(6))); *see also Davidson*, 797 F.3d at 1315-16 ("The statutory text is entirely transparent. . . . [A] person must regularly collect or attempt to collect debts *for others* in order to qualify as a 'debt collector' under the second definition of the term"); S.

Rep. No. 95-382, at 3 ("The Committee intends the term 'debt collector,' subject to the exclusions discussed below, to cover all *third persons* who regularly collect debts *for others*" (emphasis added)). *But see Bridge*, 681 F.3d at 359; *Ruth v. Triumph P'ships*, 577 F.3d 790, 796-97 (7th Cir. 2009); *Check Investors*, 502 F.3d at 173.

With this interpretation of § 1692a(6), we turn to the complaint in this case to assess what it states about Santander. The complaint alleges that the plaintiffs borrowed money from CitiFinancial Auto to purchase automobiles and that, when the plaintiffs went into default on the loans, CitiFinancial Auto repossessed and sold their automobiles, leaving them owing deficiency balances. It also alleges that when the loans were in default but *before* December 1, 2011, Santander was "hired . . . as a servicer to collect" on the loans, presumably on behalf of CitiFinancial Auto.

But the very next paragraph of the complaint alleges that on December 1, 2011, CitiFinancial Auto sold the plaintiffs' loans to Santander. *Only thereafter*, when Santander began collecting from the plaintiffs on the loans that it had purchased, did Santander engage in the conduct that the plaintiffs allege was in violation of the FDCPA. Specifically, the complaint alleges that after December 1, 2011, Santander improperly contacted the borrowers directly, misrepresented the amounts owed, and misrepresented the fact that Santander was entitled to collect on the loans. Importantly, however, the complaint does *not* allege that, when Santander engaged in the allegedly illegal collection practices, it

was collecting the debts *on behalf of CitiFinancial Auto*. Rather, it alleges that CitiFinancial Auto had *sold* the loans to Santander, presumably "for a few cents on the dollar," thus leaving Santander to collect on the debts for its own account. And this allegation is consistent with public SEC filings, which reveal that Santander purchased $3.55 billion in loan receivables from CitiFinancial Auto on December 1, 2011, following which Santander presumably attempted to obtain a return by collecting more than a few cents on the dollar through its collection efforts.

Applying these allegations to the definition of debt collector in § 1692a(6), it is apparent that Santander does not fall within the first or third definitions of debt collector. The complaint does not allege, nor do the plaintiffs argue, that Santander's *principal business* was to collect debt, alleging instead that Santander was a consumer finance company. The complaint also does not allege, nor do the plaintiffs contend, that Santander was using a name other than its own in collecting the debts. Thus, to allege that Santander was a debt collector, the complaint is left to satisfy the second definition of debt collector -- that Santander regularly collects debts owed to others and was doing so here.

Yet, the complaint's allegations also do not satisfy this definition because the debts that Santander was collecting were owed to it, Santander, not to another. This is alleged specifically and unambiguously. The complaint asserts that *after* Santander purchased the plaintiffs' debts on December 1, 2011 (and became the entity to which the debts were owed), it engaged in collection efforts

that violated the FDCPA. Thus, those collection efforts were pursued *for its own account*, as the loans were then owed to it. Santander was therefore not a person collecting a debt *on behalf of another*, so as to qualify as a debt collector under the second definition, but *on behalf of itself*, making it a creditor.

Because the complaint does not satisfy any definition of debt collector, the analysis ends, and the exclusions from the definition of debt collector, on which the plaintiffs rely, have no significance.

Nonetheless, the plaintiffs argue that the *default status* of a debt is determinative of whether a person who purchased the debt is a debt collector, pointing to exclusion (F)(iii), which *excludes* from the class of persons defined as a debt collector "any person collecting or attempting to collect any debt owed or due . . . another to the extent such activity . . . concerns a debt which was *not in default* at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii) (emphasis added). They argue that because that provision excludes persons collecting debts not in default, the definition of debt collector must, by a negative pregnant, necessarily include persons collecting defaulted debts that they did not originate. This logic, however, turns the statutory provision upside down, failing to recognize that the FDCPA defines debt collector by reference to those who are included in the various classes and then excludes, among others, the subset of persons who obtain nondefaulted debt to collect on it for others. As noted earlier, this exclusion was included by Congress to protect mortgage service companies and similar loan servicers who acquire debt not in default

and service it for a fee. The exclusion thus does not define "debt collector," but rather identifies a class of persons *excluded* from the definition of "debt collector."

In a similar vein, the plaintiffs argue that the definition of *creditor* supports their position that *the default status* of a debt defines whether a person attempting to collect that debt is a debt collector. In making this argument, they rely on the exclusion to the definition of creditor but, in doing so, the plaintiffs again apply the same kind of upside-down logic that relies on an inaccurate premise and a *negative pregnant that does not follow.*

The term "creditor" is defined by the FDCPA as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4). The definition then excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Id. The plaintiffs argue that Santander fits the creditor* exclusion and therefore must necessarily be a debt collector.

The logic does not follow, mainly because debt collector is defined separately and that definition, rather than some implied definition, is determinative. But the logic is flawed even more fundamentally because the premise that Santander *satisfies the exclusion is incorrect. In arguing that* Santander satisfies the exclusion, the plaintiffs *recharacterize* the facts they alleged in the complaint, stating in their brief that, "although Santander currently owns [the plaintiffs'] debts, those debts

were assigned to Santander after default and *solely for the purpose of facilitating collection of the debts for CitiFinancial [Auto].*" (Emphasis added). But the facts that the plaintiffs presume in their brief are not the facts of their complaint. The complaint alleges that CitiFinancial Auto *sold* the loans to Santander and that Santander thereafter attempted to collect on them *for its own account*. Santander was, at the time of its allegedly illegal collection conduct, the plaintiffs' creditor, and nothing in the complaint suggests that it was acting on behalf of CitiFinancial Auto. The complaint does allege that *before* CitiFinancial Auto sold the loans to Santander, CitiFinancial Auto had "hired" Santander as a servicer to collect the plaintiffs' defaulted debt. But any conduct that Santander might have carried out as a debt servicer on CitiFinancial Auto's behalf was carried out *before* the debts were *sold* to Santander and *before* Santander engaged in the allegedly illegal collection conduct.

Apart from their argument based on the default status of debt, the plaintiffs also seek to avoid the interpretation of "debt collector" that we make, arguing that the second definition of debt collector in § 1692a(6) includes two separate classes of persons, one of which regularly collects "debts owed or due" and the other of which regularly collects "debts . . . asserted to be owed or due *another*." They argue that Santander fits into the first class of persons, even if it does not fit into the second, because the word "another" applies only to the second. To make this argument, however, the plaintiffs break in two the singular statutory phrase in § 1692a(6), which

defines debt collector as including any person who "regularly collects or attempts to collect . . . *debts owed or due or asserted to be owed or due another*," 15 U.S.C. § 1692a(6) (emphasis added), arguing that the term "another" modifies only the portion of the last phrase, "asserted to be owed or due another." We do not agree. While Congress did break up the definition of debt collector in § 1692a(6), defining several distinct classes of persons who qualify as a debt collector, it did not divide the "regularly collects" phrase. *As the phrase is written*, the word "another" modifies both "owed or due" and "asserted to be owed or due," so that the phrase defines a debt collector as including a person who collects debt due another *or* asserted to be due another. *Cf. Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all" (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920))).

In another attempt to avoid our interpretation, the plaintiffs argue that "debts owed or due another" could refer to debts that were due another either when they were first *incurred* or at the time of the *collection activity*. Thus, according to the plaintiffs, when Santander collected on the debts that it had purchased, it could be seen as having acted to collect the debts of *another* because the loans were originally due to CitiFinancial Auto. This argument, however, is no more persuasive. Insofar as Congress was regulating debt-collector conduct, defining the term

"debt collector" to include a person who regularly collects debts owed to another, it had to be referring to debts as they existed *at the time of the conduct* that is subject to regulation. *See Davidson*, 797 F.3d at 1318 ("[O]ur inquiry under § 1692a(6) is not whether Capital One regularly collects on debts *originally* owed or due another and now owed to Capital One; our inquiry is whether Capital One regularly collects on debts owed or due another at the time of collection"); *see also Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2013) ("The statute is not susceptible to the [plaintiffs'] interpretation that 'owed or due another' means 'originally owed or due another'").

Finally, the plaintiffs argue that because Santander had, before December 1, 2011, been a debt collector with respect to their loans, it remained a debt collector after it purchased their loans and thereafter collected on them. They suggest that Santander's *status* as a debt collector, generally, made it subject to regulation. As they summarize:

> In order for this Court to hold that Santander is not a "debt collector" with respect to [plaintiffs'] defaulted debts, this Court would have to create a loophole in the FDCPA that allows an entity acting as a "debt collector" while servicing . . . defaulted debts to become a "creditor" simply by purchasing the defaulted debt it was collecting for another.

Again, we reject this argument. Under the plaintiffs' interpretation, a company such as Santander -- which, as a consumer finance company, lends money, services loans, collects debt for itself, collects debt for

others, and otherwise engages in borrowing and investing its capital -- would be subject to the FDCPA for *all* of its collection activities simply because one of its several activities involves the collection of debts for others. Congress did not intend this. Rather, it aimed at *abusive conduct by persons who were acting as debt collectors*. *See* 15 U.S.C. § 1692(e) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors"). It therefore provided that, barring application of one of the exclusions, an entity that "collects or attempts to collect . . . debts owed or due . . . another" on a regular basis qualifies as a debt collector *when it engages in collection activity on behalf of another*. *Id.* § 1692a(6). But when that same entity acts to collect its own debts, it is acting as a *creditor*, not a *debt collector*. *See id.* §§ 1692a(4), 1692a(6). Santander is therefore subject to the FDCPA only when acting as a "debt collector" as defined in § 1692a(6). Were it otherwise, every creditor that collects on its own loans and that also engages in the business of regularly collecting debts on behalf of others would be pulled under the regulation of the FDCPA not just when it collects for others, but also when it collects for itself.

At bottom, a valid claim under the FDCPA inherently requires the coming together of all the statutory elements at the time of and in connection with the prohibited conduct. Thus, for example, when a plaintiff claims that a defendant violated § 1692e (prohibiting a "debt collector" from using "any false, deceptive, or misleading misrepresentation or means in connection with the collection of any debt"), he

must prove that the defendant was acting as a debt collector, as defined by § 1692a(6), when it engaged in misrepresentations in connection with the collection of debt from the plaintiff.

* * *

Because the complaint failed to allege facts demonstrating that Santander was acting as a "debt collector," as defined by § 1692a(6), when it was collecting on debts owed by the plaintiffs, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICKY HENSON, *et al.*

Plaintiffs,

v.

SANTANDER CONSUMER USA, INC., *et al.*,

Defendants.

****

Civil Action No. RDB-12-3519

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MEMORANDUM OPINION

This suit brought by Plaintiffs Ricky Henson, Ian Matthew Glover, Karen Paccouoloute, and Paulette House (collectively "Plaintiffs") against Defendants Santander Consumer USA, Inc. ("Santander"), NCB Management Services, Inc. ("NCB"), and Commercial Recovery Systems, Inc. ("CRS") concerns alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), U.S.C. § 1692 *et seq*. Pending before this Court are Defendant Santander's Motion to Dismiss Pursuant to Rule 12(b)(6) (ECF No. 8) and Defendants NCB and CRS's Motion to Dismiss

Pursuant to Rule 12(b)(6) (ECF No. 10). The parties' submissions have been reviewed and no hearing is deemed necessary. *See* Local Rule 105.6 (D. Md. 2011). For the reasons stated herein, Defendant Santander's Motion to Dismiss (ECF No. 8) is GRANTED. Co-Defendants NCB and CRS's Motion to Dismiss (ECF No. 10) is GRANTED IN PART; specifically, the Motion is granted as to Defendant NCB only. With respect to Defendant CRS, this matter is stayed pending resolution of the bankruptcy proceedings against it, and the case will be administratively closed until that point.

BACKGROUND

This Court accepts as true the facts alleged in the Plaintiffs' Complaint. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011). According to the Complaint, Plaintiffs each entered into Retail Installment Sale Contracts ("Contracts") with CitiFinancial Auto Credit, Inc., CitiFinancial Auto Corp., or CitiFinancial Auto, LTD (collectively "CitiFinancial Auto") for the purposes of financing motor vehicle purchases in the state of Maryland. Compl. ¶¶ 27-30, ECF No. 1. At some point after entering into the Contracts with CitiFinancial Auto, each Plaintiff failed to meet their payment obligations and defaulted. *Id.* at ¶ 32. CitiFinancial Auto subsequently repossessed and sold the Plaintiffs' motor vehicles, leaving a deficiency balance on the Plaintiffs' accounts. *Id.* at ¶¶ 33-37. A class action lawsuit ensued against CitiFinancial Auto in this Court, alleging that Citi had violated certain provisions of Maryland State law governing the repossession of motor vehicles. *Id.* at ¶¶ 38, 39; *see*

Complaint, *Thomas v. CitiFinancial Auto Credit, Inc.*, Civ. A. No. JKB-10-528 (D. Md. March 3, 2010), ECF No. 2. The parties ultimately entered into a settlement agreement approved by this Court on May 29, 2012 after conducting a fairness hearing, in which CitiFinancial Auto agreed to waive deficiency balances for class members.[1] Compl. ¶¶ 40-44. Class members also retained "any [potential] claims . . . that may be asserted against Santander Consumer USA Inc. or . . . any person or entities collecting on their behalf, arising from efforts to collect on Settlement Class Members' accounts." *Id.* at ¶ 46.

Plaintiffs contend that on or before December 1, 2011, Santander purchased the delinquent accounts from CitiFinancial Auto and was aware that the delinquent accounts were the subject of a class action lawsuit and settlement, which had been preliminarily approved. *Id.* at ¶ 48-50. After acquiring the delinquent accounts, Santander began efforts to collect debts originally owed to CitiFinancial Auto. *Id.* at ¶ 52. During these efforts Santander is alleged to have misrepresented (1) the amount of debt owed, and (2) its authority to collect such debt. *Id.* at ¶ 55.

After purchasing the delinquent accounts from CitiFinancial Auto, Plaintiffs aver that Santander hired Co-Defendants NCB and CRS to aid in the collection of debts it had acquired. *Id.* at ¶¶ 58, 70.

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[1] This Court preliminarily approved the settlement on November 14, 2011. Id. at ¶ 42. By the same order, class members were appointed counsel in the then-pending matter. Id.

With respects to NCB and CRS, Plaintiffs similarly contend that the Co-Defendants misrepresented the following during its collection efforts beginning on or about December 1, 2011: (1) the amount of debt owed, (2) its authority to collect such debt, and (3) the identity of the debt owner. *Id.* at ¶ 67, 75. There are no allegations that either NCB or CRS was aware of the class action lawsuit or settlement.

STANDARD OF REVIEW

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is "to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

The Supreme Court's recent opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "require that complaints in civil actions be alleged with greater specificity than previously was required." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted). The Supreme Court's decision in *Twombly* articulated "[t]wo working principles" that courts must employ when ruling on Rule 12(b)(6) motions to dismiss. *Iqbal*, 556 U.S. at 678. First, while a court must accept as true all the factual allegations contained in the complaint, legal conclusions drawn

from those facts are not afforded such deference. *Id.* (stating that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim); *see also Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) ("Although we are constrained to take the facts in the light most favorable to the plaintiff, we need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." (internal quotation marks omitted)).

Second, a complaint must be dismissed if it does not allege "a plausible claim for relief." *Iqbal*, 556 U.S. at 679. Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Although the plausibility requirement does not impose a "probability requirement," *id.* at 556, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see also Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 291 (4th Cir. 2012) ("A complaint need not make a case against a defendant or *forecast evidence* sufficient to *prove* an element of the claim. It need only *allege facts* sufficient to *state* elements of the claim." (emphasis in original) (internal quotation marks and citation omitted)). In making this assessment, a court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief.

Iqbal, 556 U.S. at 679. "At bottom, a plaintiff must nudge [its] claims across the line from conceivable to plausible to resist dismissal." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (internal quotation marks omitted).

ANALYSIS

Defendants Santander, individually, (ECF No. 8) and NCB and CRS, jointly, (ECF No. 10) have filed Motions to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons herein, Defendant Santander's Motion (ECF No. 8) is granted. As to Defendants NCB and CRS, the Motion is granted with respect to the claims made against Defendant NCB. However, this matter is stayed as to Defendant CRS pending resolution of its bankruptcy proceedings.

I. "Debt Collector" Under the FDCPA

Plaintiffs have failed to "allege facts that make it plausible to believe that [Defendant Santander] is in fact a debt collector as defined by the FDCPA" sufficient to withstand a Rule 12(b)(6) motion. *Givens v. Citimortgage, Inc.*, PJM-10-1249, 2011 WL 806463, at *2 (D. Md. Feb. 28, 2011); *Sparrow v. SLM Corp.*, RWT-08-00012, 2009 WL 77462, at *2 (D. Md. Jan. 7, 2009); *see also Johnson v. BAC Home Loans Servicing, LP*, 867 F. Supp. 2d 766, 777 (E.D. N.C. Sept. 29, 2011) (noting that a court must determine whether the defendant is a "debt collector" as contemplated by the FDCPA before assessing whether "Plaintiffs have validly stated claims of violations"); *Moore v. Commonwealth Trustees, LLC*, 2010 WL 4272984, at *2 (E.D. Va. Oct. 25, 2010)

(same). Under the FDCPA, a debt collector is defined as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6).

"The FDCPA does not, however, apply to creditors collecting debts in their own names and whose primary business is not debt collection." *Ramsay v. Sawyer Property Mgmt., LLC*, 948 F. Supp. 2d 525, 531 (D. Md. May 31, 2013) (quoting *Kennedy v. Lendmark Fin. Serv.*, RDB 10-02667, 2011 WL 4351534, at *3 (D. Md. Sept. 15, 20110)); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 379 n. 2 (4th Cir. 2006) (quoting *Nielson v. Dickerson*, 307 F.3d 623, 634 (7th Cir. 2002)) ("[C]reditors who are attempting to collect their own debts generally are not considered debt collectors under the statute."); *Sterling v. Ourisman Chevrolet, Inc.*, 943 F. Supp. 2d 577, 586 (D. Md. May 2, 2013) (quoting *Eley v. Evans*, 476 F. Supp. 2d 531, 534 (E.D. Va. 2007)). Although, as a general matter creditors are exempt from liability under the FDCPA, a narrow exception exists where the purported creditor: "[1] received an assignment or transfer of a debt in default [and; [2] receives the same] solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4) (the "assignee" exception).

A. Santander is Not a Debt Collector and the Assignee Exception is Inapplicable.

Plaintiffs have failed to allege facts sufficient to support the contention that Defendant Santander was acting as a debt collector. As explained above, a "debt collector" is (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts" or (2) "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." § 1692a(6); *Ramsay,* 948 F. Supp. 2d at 531.

There is no plausible allegation that Santander's primary business purpose is the collection of debts. *See generally* Compl., ECF No. 1; *cf.* Pls.' Opp'n Def. Santander's Mot. Dismiss, ECF No. 15, at 14, 15 n.6 (noting that "Santander *issues and services* tens of thousands of car loans each year" (emphasis added)). Instead Plaintiffs aver that Santander, as a non-originating debt buyer, falls within the definition of "debt collector" because it "regularly collects or attempts to collect debts owed or due" and acquired the Plaintiffs' accounts after default. *Id.* at 14-15. Plaintiffs assert that § 1692a(6) (defining "debt collector") applies to both the collection of debt "(1) owed or due (including debt originator and any non-originating debt buyer); or (2) asserted to be owed or due another (including debt servicer)." *Id.* at 9. Or put differently, Plaintiffs argue that the term "due another" does not modify "debts owed or due," but

only debts "asserted to be owed or due." Relying on § 1692a(6)(F)(iii),[2] Plaintiffs conclude that non-originating debt buyers (i.e. Santander) are subject to liability under the FDCPA where the debt acquired was in default.[3] Accordingly, Plaintiffs argue that Santander cannot shield itself using the creditor exemption because it is a "debt collector."[4]

In support of its Motion to Dismiss, Santander argues that it is a creditor exempt from liability under the FDCPA because it held the debt and collected the same on its own behalf. Def. Santander's Mem. Supp. Mot. Dismss, ECF No. 9, at 5-8.

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[2] Section 1692a(6)(F)(iii) states in pertinent part that "[t]he term [debt collector] does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person."

[3] Once again, this interpretation is premised on Plaintiffs' reading that the term "for another" modifies only debts "asserted to be owed or due."

[4] Plaintiffs do not expressly rely on the assignee exception to the creditor exemption; rather they assert that Santander is a "debt collector." See Pls.' Opp'n to Def. Santander, ECF 15, at 10 ("a non-originating debt buyer that purchases debt in default is not specifically excluded from the definition of 'creditor' because the non-originating debt buyer already falls under the definition of 'debt collector'").

Consequently, Santander asserts that the assignee exception does not apply precisely because Plaintiffs have not, nor could they have, alleged that Santander acquired the debt "solely for the purpose of facilitating collection of the debt of another." *See id.*; Def. Santander's Reply, ECF No. 17, at 1-4.

The gravamen of this dispute concerns the situations in which a debt buyer or assignee of a debt already in default is subject to liability under the FDCPA. According to the Complaint, Santander purchased the Plaintiffs' delinquent accounts "no later than December 1, 2011" and began its collection efforts "on or around December 1, 2011." Compl. ¶¶ 48, 52. In other words, Santander owned the debt at all times during its collection activities. *Id.* Moreover, "Santander issues and services tens of thousands of car loans each year." Pl.'s Opp'n Def. Santander, ECF No. 15, at 15 n.6. As a preliminary matter, Santander appears to fall under the FDCPA's definition of creditor precisely because Santander (1) "offers or extends credit creating a debt" in the form of car loans which it services and (2) is an entity "to whom debt is owed" as a result of being the assignee. *See* § 1692a(4). However, Santander may still be liable if it "receive[d] [the] assignment or transfer of debt [1] in default [2] solely for the purpose of facilitating collection of such debt for another." § 1692(a)(4). Plaintiffs have repeatedly stated that the debt was in default at the time of the transfer. Compl. ¶ 48; *see generally* Pls.' Opp'n Def. Santander, ECF No. 15. Whether Plaintiffs' have adequately pled facts showing that Santander acquired the debt "solely for the purpose of facilitating collection of such debt for

another" requires more scrutiny as the parties disagree as to the effect of the term "for another" in the statute.

This Court has had occasion to consider this issue of statutory interpretation before in *Ransom v. Telecredit Serv. Corp.*, 1992 U.S. Dist. LEXIS 22738 (D. Md. Feb. 5, 1992) and *Ademiluyi v. PennyMac Mortg. Inv. Trust Holdings I, LLC*, 929 F. Supp. 2d 502 (D. Md. Mar. 11, 2013). In *Ransom*, this Court determined that the defendant—whose business consisted of electronically verifying checks and offering to purchase and subsequently collect on every dishonored check—fell within the definition of a "debt collector" for the purposes of the FDCPA. *Ransom*, 1992 U.S. Dist. LEXIS 22738 at *3-5. In reaching this conclusion, the Court considered whether the assignee exception in § 1692(a)(4) required that the collections effort be "for another" as the plain language suggests. *Id.* at *19-20. The Court disagreed with such a strict reading of the statute in all instances, explaining that:

> [t]o say that [the assignee] exception applies only to those who collect debts for others would be to render the exception superfluous and meaningless; those who collect debts for others are not within the original definitional universe [of creditors], and there is therefore no need to exclude them.

Id. at 20-21 (quoting *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987)).

More recently in *Ademiluyi*, this Court considered on a motion to dismiss whether a non-originating debt buyer who purchases debt in default

and seeks to collect the debt for itself fell within the purview of the FDCPA. This Court noted, as a preliminary matter, that courts in other jurisdictions have "determined that it is appropriate to disregard the 'of another' language only where 'an artificial distinction between 'creditor' and 'debt collector' as a result of the 'for another' language would unfairly allow a debt collector to masquerade as a creditor.'" *Ademiluyi*, 929 F. Supp. 2d at 525 (quoting *Schlegel v. Wells Fargo Bank, N.A.*, 799 F. Supp. 2d 1100, 1105 (N.D. Cal. 2011)). Ultimately, however, this Court was unable to determine whether "strictly applying the 'for another' language would 'unfairly allow a debt collector to masquerade as a creditor'" because it was unable to determine whether "defendants purchase debts 'solely' for collection, or . . . for servicing." *Id.* at 526. Neither case, however, stands for the proposition that a debt-buyer is necessarily a "debt collector" where they acquire debt in default.

Plaintiffs have failed to allege facts making it plausible that Santander falls under the assignee exception. Unlike the defendant in *Ransom*, there is no indication that Santander "is not in the business of extending credit." *Ransom*, 1992 U.S. Dist. LEXIS 22738 at *15 (basing its decision, in part, on a prior ruling which held that the defendant "is a third party collecting a debt originally owed to another. . . . It is not in the business of extending credit") (quoting *Holmes v. Telecredit Serv Corp.*, 736 F. Supp. 1289, 1293 (D. Del. 1990)). Indeed, Plaintiffs expressly state that "Santander *issues* and services tens of thousands of car loans each year." Pl.'s Opp'n Def.

Santander, ECF No. 15, at 15 n.6 (emphasis added). Moreover, with respect to the collection activity concerning the Plaintiffs, there is no indication that Santander acquired the debt "solely for the purpose of collection" as opposed to servicing. To the contrary, Plaintiffs base their argument, in part, on the assertion that Santander acted as a servicer. *See id.* at 15 ("Santander does not dispute that Named Plaintiffs' debts were already in default at the time the debts were *acquired by Santander for servicing*.") (emphasis added). In other words, Plaintiffs have failed to allege that Defendant Santander is attempting to improperly "masquerade" or shield itself under § 1692(a)(4)'s creditor exemption precisely because Plaintiff affirmatively alleges that Santander acquires debts for servicing rather than just mere collection. The Plaintiffs' cursory assertions that Santander is a "debt collector" because it purchased debts in default do not create a plausible cause of action. Moreover, this Court cannot ignore Plaintiffs' failure to properly address the applicability of the § 1692(a)(4) assignee exception.

This Court also takes note of the fact that, while not binding, the District Court for the Eastern District of Virginia previously determined that Santander was a creditor exempt from liability under the FDCPA. *See Blagogee v. Santander Consumer USA, Inc.*, No. 1:11-CV- 680 AJT/TRJ (E.D. Va. Nov. 29, 2011), *aff'd per curiam*, 474 Fed. App'x 366 (4th Cir. 2012) (unpublished). The plaintiff in *Blagogee*, similarly alleged that Santander purchased and subsequently serviced and collected on an auto loan that was in default at the time of purchase. *See*

Verified Am. Compl. for J. at ¶¶ 2, 3, 21, *Blagogee v. Santander Consumer USA, Inc.*, No. 1:11-CV-680 AJT/TRJ (E.D. Va. Nov. 29, 2011). In granting Santander's motion to dismiss, the district court noted that the plaintiff "failed to allege, at a minimum, that Santander received it assignment 'solely for the purpose of facilitating collection of such debt *for another*.'" *Id.* at *2 (emphasis in original). Or put differently, the district court strictly applied the language "for another."[5] Although the decision was affirmed on appeal,[6] the Fourth Circuit has yet to

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[5] The district court did not address the case law addressing the statutory term "for another" in its opinion.

[6] Specifically, the Fourth Circuit issued an unpublished, per curiam opinion stating as follows:

> William A. Blagogee appeals the district court's order denying relief on his complaint alleging violations of the Truth in Lending Act, 15 U.S.C.A. §§ 1601 to 1667(f) (West 2009 & Supp.2012), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 to 1692p (2006). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Blagogee v. Santander Consumer USA, Inc.*, No. 1:11–cv– 00680–AJT–TRJ (E.D. Va. filed Nov. 29, 2011 & entered Nov. 30, 2011). We dispense with oral argument

discuss whether the "for another" language contained in § 1692a strictly applies. Accordingly, this Court's interpretation of § 1692a(4) is guided by the decisions in *Ransom* and *Ademiluyi*.

B. Defendant Santander is Not Vicariously Liable for the Alleged Conduct of Co-Defendants NCB and CRS.

Plaintiffs also suggest that Santander is vicariously liable for the conduct of Co- Defendants NCB and CRS. Pls. Opp'n Def. Santander, ECF No. 15, at 2 n. 1. Contrary to Plaintiffs' assertions, this Court has previously held that a creditor is not ordinarily liable for the conduct of a debt collector acting on its behalf. *Ramsay v. Sawyer Prop. Mgmt., LLC*, 948 F. Supp. 2d 525, 535 (D. Md. 2013); *Fontell v. Hassett*, 870 F. Supp. 2d 395, 412 (D. Md. 2012). As discussed above, Santander owned the debt during the relevant time period and Plaintiffs have failed to demonstrate that Santander falls within the assignee exception to the creditor exemption. Moreover, there is no concern, nor is there any suggestion, that Santander employed the Co-Defendants NCB and CRS in an effort to shield itself from liability under

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because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.
AFFIRMED.

Blagogee v. Santander Consumer USA, Inc., 474 Fed. App'x 366 (4th Cir. 2012) (*per curiam*) (unpublished).

the FDCPA. Holding Santander vicariously liable would not further the purposes of the FDCPA; therefore, it would be inappropriate to do so. As previously discussed by this Court:

> [I]f the [Defendant] is not a debt collector subject to liability under the FDCPA itself, then its decision to hire [a debt collector] to engage in debt collection practices on its behalf would not be predicated on evading FDCPA liability, and imputing liability under those circumstances would not further the interests of the Act.

Fontell, 870 F. Supp. 2d at 412; *see also Ramsay*, 948 F. Supp. 2d at 535 (noting that because the defendant "is not a debt collector . . . [t]here is no concern . . . that [the defendant] employed [a collection agent] to avoid compliance with the FDCPA.").

II. Plaintiffs Have Failed to Meet the Pleading Standards of Rule 12(b)(6) Against Defendant NCB

Plaintiffs have failed to plead sufficient factual allegations supporting their claims against Defendant NCB. Plaintiffs allege that NCB, through its collection efforts, violated "Sections 1692c(a)(2), 1692(d), 1692e(2), 1692e(8), 1692e(10) and 1692f."[7]

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[7] The Complaint asserted that NCB violated *inter alia* "15 U.S.C. §§ 1692 (b); 1962c, 1962c(b), 1692d, 1692e, 1692e(2), 1692e(5), 1692e(10), 1692e(11), 1692f and 1692g(a)." Compl., ECF No. 1, at 12 ¶ 77. Plaintiffs have dropped several of these claims,

Pls.' Opp'n Defs. NCB and CRS's Mot. Dismiss, ECF No. 16, at 14. As explained below, this Court is unable to discern allegations in the Complaint which would support each of these claims.

Section 1692c(a)(2) prohibits a debt collector, without prior consent, from communicating with the consumer

> [I]f the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer[.]

Id. There are simply no allegations that Defendant NCB was aware of either the class action proceeding against CitiFinancial or that Plaintiffs' were represented by counsel. Indeed, Plaintiffs' only assert that Santander was aware of the pending lawsuit. Compl., ECF No. 1, at 9, ¶ 49; Pls.' Opp'n Defs. NCB and CRS, ECF No. 16, at 9-10.

Section 1692d prohibits conduct, "the natural consequence of which is to harass, oppress, or abuse." *Id.* There are no allegations that NCB engaged in any

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however, as indicated in its Reply. To be sure, the claims advanced against NCB are identical to those advanced against CRS. However, as discussed *infra*, this matter is stayed as to claims made against CRS.

such conduct. Rather, Plaintiffs cursorily assert that "[r]eceipt of a collection call or letter from a debt collector that has no legal ability to collect from the consumer is conduct that results in harassment and abuse." Pls.' Opp'n Defs. NCB and CRS, ECF No. 16, at 6. This assertion is premised on the claim that "Santander was not provided any contractual authority to collect from" the Plaintiffs. Neither claims, however, are supported by factual assertions whatsoever and therefore fail. Moreover, these assertions are inconsistent with Plaintiffs' allegations that "Santander purchased the delinquent [Plaintiffs'] accounts." Compl., ¶ 48.

Plaintiffs' Complaint also fails to provide adequate factual allegations to support the § 1692e(2), (8), and (10) claims. With respect to § 1692e(8), prohibiting debt collectors from "communicating . . . to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed," Plaintiffs have not provided any support that NCB had knowledge that the debts were being disputed. Rather, they only assert that Santander had knowledge that the debts were disputed "and failed to notify NCB." Pls.' Opp'n Defs. NCB and CRS, ECF No. 16, at 10. This is insufficient to establish that NCB was somehow aware of the disputed status of the debt. *See Robinson v. Greystone Alliance, LLC*, BPG-10-3658, 2011 WL 2601573 at *7 (D. Md. June 29, 2011) (quoting *Shah v. Collecto, Inc.*, 2005 WL 2216242, at *10 (D. Md. Sept. 12, 2005) ("[Section 1692e(8)] expressly requires knowledge.").

Plaintiffs' § 1692e(2) and (10), and likewise Plaintiffs' § 1692f claims, are dependent upon the notion that NCB misrepresented the amount of debt owed. This misrepresentation apparently stems from the then-pending status of the class action lawsuit against CitiFinancial. However, the alleged conduct of NCB occurred and ceased while the case was pending, and neither a final judgment nor a final settlement had been reached. Therefore, Plaintiffs cannot based their assertion that NCB misrepresented the amount of debt owed on either the lawsuit against CitiFinancial or the settlement agreement. In sum, Plaintiffs have failed to plead facts sufficient to support any of its conclusory legal assertions against Defendant NCB.

III. Automatic Stay as to Defendant CRS Pending Resolution of Bankruptcy Proceedings

Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the [bankruptcy proceeding]." *Id.* On or about November 19, 2013, Defendant CRS filed a voluntary bankruptcy petition, which is currently pending in the United States Bankruptcy Court for the Eastern District of Texas. Def.'s Suggestion Bankr. & Notice Automatic Stay, ECF No. 23, at 1. Because the instant case concerns the Plaintiffs' effort to, *inter alia*, collect or recover a claim against CRS and was initiated prior to the filing of CRS' bankruptcy

petition, this matter is stayed pending resolution of the bankruptcy proceeding.

CONCLUSION

For the reasons stated above, Defendant Santander's Motion to Dismiss (ECF No. 8) is GRANTED. Co-Defendants NCB and CRS's Motion to Dismiss (ECF No. 10) is GRANTED IN PART; specifically, the Motion is granted as to Defendant NCB only. With respect to Defendant CRS, this matter is stayed pending resolution of the bankruptcy proceedings against it, and the case will be administratively closed until that point.

A separate Order follows.

Dated: May 6, 2014

/s/
Richard D. Bennett
United States District Judge

APPENDIX C

FILED: April 19, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1187
(1:12-cv-03519-RDB)

RICKY HENSON; IAN MATTHEW GLOVER; KAREN PACOULOUTE, f/k/a Karen Welcome Kuteyi; PAULETTE HOUSE,
Plaintiffs - Appellants,

v.

SANTANDER CONSUMER USA, INC.,
Defendant - Appellee,

and

COMMERCIAL RECOVERY SYSTEMS, INC.; NCB MANAGEMENT SERVICES, INCORPORATED,
Defendants.

AARP; NATIONAL CONSUMER LAW CENTER; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; CIVIL JUSTICE, INC.; PUBLIC JUSTICE CENTER, INC.; MARYLAND

CONSUMER RIGHTS COALITION, INC.; ATTORNEY GENERAL OF MARYLAND,

Amici Supporting Appellants.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk